

FEDERAL MAGISTRATES COURT OF AUSTRALIA

PHAM v MINISTER FOR IMMIGRATION & ANOR [2009] FMCA 287

MIGRATION – MRT decision – prospective spouse temporary visa – whether couple genuinely intend to live together as spouses – arranged marriage – claims that marital relationship already commenced – Tribunal did not address wrong question – it addressed claims made by parties – no jurisdictional error made – application dismissed.

Migration Regulations 1994 (Cth), regs.1.15A, 1.15A(2), 1.15A(3), 1.15A(4), Sch.2 cl.300.214, 300.215, 300.216, 300.221

Ally v Minister for Immigration & Anor [2007] FMCA 430

Ally v Minister for Immigration & Citizenship [2008] FCAFC 49

Htun v Minister for Immigration & Multicultural Affairs (2001) 194 ALR 244

Minister for Immigration & Citizenship v Yucesan [2008] FCAFC 110

NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2) (2004) 144 FCR 1

Re Secretary, Department of Social Security & Villani (1990) 11 AAR 390

Re Trail & Secretary, Department of Social Security (1986) 4 AAR 238

Applicant:	JIMMY PHAM
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 3052 of 2008
Judgment of:	Smith FM
Hearing date:	25 March 2009
Delivered at:	Sydney
Delivered on:	25 March 2009

REPRESENTATION

Counsel for the Applicant: Mr N Poynder
Solicitors for the Applicant: Janice Vu & Associates
Counsel for the Respondents: Mr T Reilly
Solicitors for the Respondents: Sparke Helmore

ORDERS

- (1) The application is dismissed.
- (2) The applicant must pay the first respondent's costs in the sum of \$5,000.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 3052 of 2008

JIMMY PHAM
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. Mr Pham seeks judicial review of a decision of the Migration Review Tribunal handed down on 31 October 2008. The Tribunal affirmed a decision of a delegate refusing to grant to Ms Thi Anh Van Do a class TO subclass 300 ‘prospective marriage’ visa, upon an application for which Mr Pham was the sponsor. This subclass of visa is a temporary visa granted to an offshore visa applicant, which enables them to travel to Australia to enter into a proposed marriage. The visa lasts for up to nine months before it expires, and it is anticipated that most visa holders within that time would conclude their marriage and apply for a permanent residence spouse visa under subclass 801 (see Sch.2 cl.801.221(2)). The spouse visa itself would normally not be

granted until two years after the onshore application for the spouse visa.

2. The significant criterion upon which both the delegate and the Tribunal were not satisfied as to Ms Do's eligibility, was the criterion in Sch.2 cl.300.216 of the *Migration Regulations 1994* (Cth) that:

The Minister is satisfied that the parties genuinely intend to live together as spouses.

3. This criterion is a time of application criterion, as well as having to be satisfied at time of decision (see cl.300.221).

4. Other criteria at time of application require the visa applicant have an intention to marry an Australian citizen or a permanent resident or an eligible New Zealand citizen, that there is no prohibited circumstance, that the prospective spouse meets sponsorship requirements, and that the parties have "*met and are known to each other personally*" (see cl.300.214 and note *Minister for Immigration & Citizenship v Yucesan* [2008] FCAFC 110). Also, under cl.300.215:

300.215 The applicant establishes:

- (a) that the parties genuinely intend to marry; and*
- (b) that the marriage is intended by the parties to take place within the visa period.*

5. Mr Pham's sponsorship application was accompanied by statutory declarations by both Mr Pham and Ms Do and other evidence, concerning the circumstances in which they had been introduced, decided to marry, undergone a wedding ceremony in Vietnam, and intended to continue their relationship.

6. Mr Pham's statutory declaration referred to his suffering from epilepsy, and to his mother being his carer. He said:

- I am currently married to Thi Anh Van Do ...*
- We were married on 13 February 2007 in accordance to our traditional Vietnamese customs and ceremony.*

- *The wedding ceremony took place at my grandmother's house and at my wife's house both in [location] and with the reception at [restaurant].*
- *Attending our wedding were my wife's grandfather, mother, aunts and uncles, my grandmother, mother, aunts and uncles and our other relatives and her friends totalling approximately 110 people.*
- *Our relationship is genuine, ongoing and to the exclusion of all others.*

Below is a brief summary of our relationship:

- *My wife's family and my aunt and my grandmother live near by each other in [location]. They have known each other for a long time. They are good friends.*
- *My sister, [Ms Nguyen] was in Vietnam from 24 December 2006 to 09 January 2007 for a visit to our relatives. Whilst in Vietnam, my sister had an occasion to meet Anh Van. And through talking and visiting each other's family, my grandmother, my aunt, my sister and Anh Van's mother wished to match Anh Van and me.*
- *After coming back to Australia, my sister showed me a picture of Anh Van and told my mother and me about their intention to match up Anh Van and me.*
- *I liked Anh Van at first sight. I agreed to meet her. After discussing, my mother and I then decided to travel to Vietnam to meet Anh Van and her family. We flew to Vietnam having arrived on 04 February 2007.*
- *I first met Anh Van in person the next day – 05 February 2007. My mother, my aunt and I went to see Anh Van and her mother at her house. The elders discussed and agreed for Anh Van and me to get to know each other with the plan that if we agreed, we could get married.*
- *Anh Van and I spent time to get to know each other. I found attracted to her very much. As time passed, we gained our trust in and feelings for each other.*
- *On 10 February 2007, in the presence of both sides of our families, Anh Van and I advised everyone that we agreed to get married. Everyone was very happy for us.*

- *On 13 February 2007, we celebrated our wedding with the ceremony at my grandmother's house and at her house; and with the reception at [restaurant].*
- *After the wedding, Anh Van and I lived happily together as man and wife at her home.*
- *We also traveled to visit some beautiful sights in [locations], etc ...*
- *On 18 February 2007, Anh Van and I sent my mother off at the [airport] where she departed for Sydney.*
- *On 08 March 2007, I left Vietnam to return to Australia.*
- *My wife and I are currently living apart from each other. We are missing each other very much and long to be together each day.*
- *My wife and I are keeping in regular contact with each other via telephone calls and letters.*
- *As Anh Van and I have not registered for our marriage certificate, we are not officially married. Therefore, I wish to sponsor my wife – Thi Anh Van Do to come to Australia under the Prospective Marriage category.*
- *I have discussed with Anh Van and we both decide that we would obtain our marriage certificate later in Sydney, Australia once she'd arrive.*
- *I have also approached Mr. P, a Marriage Celebrant, who has agreed to conduct our wedding ceremony (in accordance to the laws in Australia) on Saturday, 22 December 2007, subject to Anh Van's arrival before then.*

7. Ms Do's statement was to similar effect, and there were witness statements about the Vietnamese wedding ceremony.

8. A delegate in Ho Chi Minh City refused the visa application on 27 November 2007, after interviewing Ms Do. In her statement of reasons, the delegate identified some concerns concerning the genuineness of the claims of Ms Do and Mr Pham to have an intention to live together in Australia as spouses. These included evidence of the claimed Vietnamese wedding which suggested that the local community had not been involved, the speed with which the

relationship was claimed to have developed in Vietnam, and Ms Do's presentation on interview as not being *"fully aware of the sponsor's condition or the care that it will require"* if she were to come to Australia to care for Mr Pham.

9. A further consideration was also identified by the delegate. Mr Pham's sponsorship application failed to answer correctly the question: *"have you previously sponsored/nominated a spouse (including de facto), prospective spouse (fiancé(e)) or independent partner?"*. He answered *"no"* to this question. However, as the delegate came to learn, this was significantly untrue. She said:

2.15 The sponsor and his family have a history of nominating Vietnamese nationals to Australia and have been known to submit false and misleading evidence to this department. In particular, I note that the sponsor has attempted to nominate two spouses onshore in Australia which have been considered contrived marriages, the second of which entered into bigamously. A recent court decision was made relating to one of his spouses (Full Federal Court – NSD2252) which noted that the sponsor had received a large sum of money from the alleged spouse when agreeing to enter into the sponsorship. It was found that the relationship had been entered into for the purposes of facilitating this person's migration to Australia and the decision was upheld that the relationship was not genuine and continuing. I have viewed the application and find that the sponsor has not declared his former relationships. As the sponsor and his family are familiar with the processes of sponsoring spouses, I find that in this instance he has attempted to hide this information from the department. Given the false and misleading information provided in this application and the history of the sponsor and his family's likely fraud with what fits the pattern of contrived marriages to Australia, I have serious doubts as to the veracity of any evidence or claims both the parties and their families have provided.

10. On review by the Tribunal, further evidence was presented to support the claim that a marital relationship had actually commenced in Vietnam before the visa application was lodged, and had continued while the visa application was under consideration. This included the birth of a son conceived during a later visit by Mr Pham to Vietnam,

and evidence of telephone calls between Australia and Vietnam which were claimed to have been those of Mr Pham and Ms Do.

11. The Tribunal also received oral evidence from Mr Pham and his mother, and by telephone from Ms Do. It then made a decision which was handed down on 31 October 2008. It affirmed the delegate's decision.

12. In its statement of reasons, the Tribunal correctly narrated the background to the matter, and identified cl.300.216 as the criterion upon which the delegate had determined the matter and upon which it also addressed the matter. It said at the start of its *"Findings and Reasons"*:

15. *Clause 300.216 requires that at the time of application the 'the parties genuinely intend to live together as spouses'.*

16. *In an effort to assist in forming a view about this criterion, I have considered the definition of 'Spouse' contained in reg 1.15A of the Migration Regulations. That provides criteria for consideration of the circumstances of the relationship, including in particular, financial aspects of the relationship, the nature of the household, social aspects of the relationship and the nature of the persons' commitment to each other: ...*

13. The Tribunal's reference to the definition of 'spouse' does not indicate clearly whether the Tribunal thought that it was bound by law to refer to the definition in reg.1.15A, or whether it merely thought that it provided an appropriate reference point for considering the ordinary meaning of the reference in cl.300.216 to *"intend to live together as spouses"*.

14. The Minister submitted that the Tribunal would have been correct in taking the view that it was bound to give consideration to the definition, notwithstanding that in its terms it is only required to be applied whenever *"for the purposes of these Regulations"* a decision-maker is determining if a person *"is the spouse of another person"* (emphasis added). It was noted that, although the required list of circumstances to be considered under reg.1.15A(3) are not expressly mandated for this class of visa, reference to that list is permitted by reg.1.15A(4). The general considerations of mutual commitment and

genuine and continuing relationship raised by reg.1.15A(2), are required to be considered in all cases where reference is made to a person being a ‘spouse’.

15. I am inclined to accept the Minister’s submission that reference to reg.1.15A was required, albeit when considering whether an unmarried couple hold a ‘genuine intention’ in relation to a future cohabitation as spouses, rather than deciding directly upon the existence of a past or present spousal relationship. However, I do not need to decide this issue in the present case, since counsel for Mr Pham conceded that as a matter of law it would have been open to the Tribunal to take guidance from the definition as to the concept of ‘spouses’ in cl.300.216, even if not bound to do so. Moreover, the considerations raised by reg.1.15A are considerations of the sort which the ordinary concept of cohabitation ‘as spouses’, or as a couple in a marriage-like relationship, would normally raise under an undefined reference in legislation (cf. authorities in social security legislation prior to a similar ‘codification’ of the concept, cited in *Re Trail & Secretary, Department of Social Security* (1986) 4 AAR 238, and *Re Secretary, Department of Social Security & Villani* (1990) 11 AAR 390).
16. The issue raised by Mr Pham in the first ground of his present application is whether the Tribunal mistakenly applied cl.300.216 by reference to headings taken from reg.1.15A and addressed the past or present matrimonial relationship of Mr Pham and Ms Do, rather than their intentions as to their future cohabitation in such a relationship in Australia. Mr Pham’s second ground contends that the Tribunal failed actually to address the case presented in the material before the Tribunal, by which they sought to satisfy the Tribunal in terms of cl.300.216. It is necessary therefore to examine closely how the Tribunal reasoned when purporting to address that criterion.
17. The Tribunal took four headings from reg.1.15A(3), being “*the financial aspects of the relationship*”, “*the nature of the household*”, “*the social aspects of the relationship*”, and “*the nature of the persons’ commitment to each other*”. It discussed the evidence under those headings, and then it explained the particular considerations which persuaded it that it was not satisfied that Ms Do met cl.300.216. On a fair reading of the Tribunal’s decision, I am not persuaded that the

Tribunal confined itself to the topics of the four headings. Indeed, ultimately its reasoning appears to have been based upon four key factors it identified as the most important matters raised by the evidence before it, rather than upon an analysis of evidence particularly relating to the four headings. Thus, the Tribunal said that it could give “*little weight*” to its consideration of the financial affairs of Mr Pham, Ms Do, and Mr Pham’s mother. It similarly gave little weight to evidence of the households in which Mr Pham and Ms Do had briefly cohabited in Vietnam.

18. Under the heading “*social aspects of the relationship*”, the Tribunal explored the concern by the delegate that the evidence did not disclose a Vietnamese wedding conducted in a local community setting, which would be normally expected. The Tribunal received further evidence about this, and it ultimately accepted that there “*is evidence that members of the applicants’ immediate and extended families see the applicants as members of a couple*”. This finding speaks in the present tense as to the state of the evidence concerning the relationship as at the time of the Tribunal’s hearing and decision. In its context, it also refers back to the situation at the time of the wedding ceremony in February 2007 and the visa application. Such a finding was not to the disadvantage of Mr Pham and Ms Do. However, ultimately, it is clear that the Tribunal concluded that its finding of family and social recognition as a couple in Vietnam was outweighed by other factors which caused the Tribunal not to be satisfied that there was a genuine intention to cohabit as spouses in Australia. This reasoning does not suggest any failure to appreciate the issue raised by cl.300.216.
19. The Tribunal identified the matters which it regarded as determinative, in the remainder of its reasons, which commenced under the heading, “*the nature of the persons’ commitment to each other*”. The material canvassed under this heading included evidence of events leading up to the visa application in May 2007, and also subsequent events, such as the birth of the son and the claim that there was regular telephone contact between Mr Pham and Ms Do.
20. Counsel for Mr Pham does not submit that the Tribunal had regard to irrelevant evidence, when considering whether events happening after the visa application could be of assistance in considering the existence

of an intention of the parties which had to be examined as at the date of application for the purposes of cl.300.216. In that respect the situation was, in my opinion, the same as the situation in *Ally v Minister for Immigration & Citizenship* [2008] FCAFC 49, where the Full Court upheld my judgment which referred to authorities which have held that a decision-maker is able, and in some circumstances bound, to address later events when making a determination as to a state of affairs at an earlier date, if they have probative relevance (see *Ally v Minister for Immigration & Anor* [2007] FMCA 430 at [34]-[36]).

21. In the present case, counsel for Mr Pham correctly conceded that it was permissible and relevant for the Tribunal to assess later events either as confirmatory, or the contrary, of an intention at the date of visa application, 30 May 2007, to cohabit in Australia as spouses if Ms Do was granted a visa. His submission was, however, that the Tribunal became distracted when it considered later events, and failed to address the correct question raised by cl.300.216.

22. In its concluding reasoning, the Tribunal identified specific matters which it later regarded as determinative, when considered cumulatively. The first was referred to by it at [29]:

29. *As did the Department delegate, the Tribunal was concerned the applicants had agreed to marry and had purportedly undergone a wedding ceremony in Vietnam; which ceremony took place less than two weeks after they first met. This is not unknown to genuinely occur, but given the Tribunal's concerns about the review applicant's credibility (for reasons discussed below), it was one matter the Tribunal believed may undermine the applicants' claim to genuinely intend to live together as spouses.*

23. This paragraph shows a correct appreciation that the evidence about events in Vietnam had to be weighed in the context of cl.300.216, and to determine the parties' intention to live together as spouses in the future. It is not, in my opinion, reflective of an erroneous focussing on the couple's past relationship, or their intentions about their future relationship at an incorrect point of time.

24. The Tribunal's discussion at [32]-[34] of its reasons of the evidence about the couple's claimed regular telephone contact similarly, in my opinion, does not show error.
25. Nor is it contended that error was shown by the Tribunal's adoption at [41] of the finding from the delegate's statement, which I have extracted above, as to Mr Pham's previous conduct in relation to contrived marriages, and his false statement in the sponsorship application. The correctness of the delegate's information was not put in issue before the Tribunal or this Court. The Tribunal said:
42. *At folio 7 (question 17) of the MRT file the review applicant was asked 'have you previously sponsored/nominated a spouse (including de facto), prospective spouse (fiance'...) or interdependent spouse' and the review applicant had said 'no'. At the Tribunal hearing, the review applicant said this was a mistake. He also advised the Tribunal he was currently on 'five years probation'; which penalty he explained had arisen due to his having previously provided false information to the Department. The review applicant's mother explained the review applicant had done this (ie agree to previously sponsor someone to Australia) as his younger brother had passed away and the review applicant was seeking to earn money in order to pay for a funeral for him. The Tribunal understands the applicant's mother then explained she had been detained for one week after possibly assaulting the previous visa applicant.*
43. *With respect, the Tribunal believes that after conviction for previous deception, it is appropriate that such an applicant ensure that everything done for further visa applications is done properly. That has not been the case here. The review applicant has failed to advise of his previous sponsorships, in the present visa application. However, without more, that may not cause the Tribunal to reject the visa application.*
26. The Tribunal then referred to the fact that the marriage had not been registered in Vietnam, notwithstanding that there had been what was claimed to have been a full marriage ceremony in Vietnam in February 2007. The Tribunal said that it was not satisfied that Mr Pham and Ms Do were legally married. The Tribunal said that it was unusual for a ceremony to take place and for the marriage not to be registered, and said:

44. ... *The explanation the review applicant provided was (words to the effect) that he wished to have a proper marriage ceremony in Australia. At any rate, the Tribunal believes it (at least) strange (if not implausible), that a marriage ceremony would take place in Vietnam but that the marriage would not have been registered there. If the marriage was sincere and genuine (as was claimed), the Tribunal might ordinarily expect the marriage to have been registered. Again however, without more, this may not lead the Tribunal to reject the applicants' case.*
27. The Tribunal then made further findings at [46] about the claimed telephone communications between Mr Pham and Ms Do, and said that *"the level of detail provided by [Mr Pham] about his conversations with the visa applicant, may not satisfy the Tribunal the relationship was genuine"*.
28. Counsel for Mr Pham referred to the past tense of *"the relationship was genuine"* in this obliquely expressed finding, as indicating an erroneous focussing by the Tribunal on whether a past spousal relationship had been established. However, when this statement is read in context, I am not persuaded by this submission. The factual context was one where Mr Pham and Ms Do had invited the Tribunal to draw conclusions about their intentions to cohabit in Australia as spouses as at May 2007, by reference to what was claimed to have been a past genuine spousal relationship from at least the time of the Vietnamese wedding and continuing during regular telephone contact. It was therefore understandable that the Tribunal would address that case by making findings as to whether it was persuaded to accept as true, the claim that a current spousal relationship was shown in telephone conversations after the Vietnamese wedding. In paragraph 46, the Tribunal did no more than this.
29. The Tribunal's critical reasoning emerges in paragraphs 47 to 49:
47. *That said, the fact of the rapid development of the relationship; the abovementioned misleading evidence on the visa application (form) the subject of this review; the fact the trouble was allegedly taken to conduct a marriage ceremony but it was not then registered in Vietnam; the lack of much detail about the apparently extensive phone conversations between the review applicant and the visa applicant (even over the last three months); and the*

evidence of a previous willingness on the part of the review applicant to provide misleading evidence to the Department, have led the Tribunal to conclude the relationship was not genuine for the purposes of the visa application (and therefore there was no genuine intention to live together as spouses). Each of the above matters, considered separately, may not have caused the Tribunal to affirm the matter before it. However, taken together, they have satisfied the Tribunal it should affirm the decision under review.

48. *Therefore, given the above adverse findings, the Tribunal is not satisfied that at the time of application the parties had a genuine intention to live together as spouses, and they therefore do not meet cl.300.216 of Schedule 2.*
49. *That said, the Tribunal is mindful of the fact the review applicant and visa applicant have an infant son. The Tribunal understands this may be considered corroborative of a genuine intention to live together as spouses. However, given the other adverse findings herein, the Tribunal is not satisfied the relevant intention existed at time of application.*

30. The amended grounds of review in the application to the Court which are relied upon are:

2. *The second respondent erred in its consideration of clause 300.216 in Schedule 2 of the Migration Regulations 1994; namely, whether at the time of the application for a visa the applicant and his prospective spouse genuinely intended to live together as spouses.*

Particulars

The second respondent limited its consideration of clause 300.216 to the factors listed in reg 1.15A(3), which are relevant to the present existence of a spousal relationship. It was thereby diverted from its obligation, which was to consider the present intention of the applicant and his prospective spouse to live together at some time in the future as spouses.

3. *The second respondent failed to comply with its obligation to review the decision of the first respondent.*

Particulars

The second respondent failed to consider the applicant's claim that his proposed marriage to the visa applicant was an arranged marriage. It thereby failed to appreciate that the parties would be unlikely to meet the factors listed in reg 1.15A(3).

31. In support of Ground 2, counsel for Mr Pham referred to the statement by the Tribunal in [47], where it referred to the four matters which “*led the Tribunal to conclude the relationship was not genuine for the purposes of the visa application*”. It was submitted that this consideration of a past spousal relationship indicated that the Tribunal had addressed the wrong question. It was submitted that the Tribunal “*fell into the trap of considering whether the parties were, at the time of decision, in a spousal relationship rather than to address the future point of time raised by item 300.216*”.
32. However, I do not accept that submission.
33. As counsel for the Minister points out, the words in brackets immediately after the words identified by counsel for Mr Pham, explain why it made that finding and how it applied it. It was, in my opinion on a fair reading of the Tribunal’s reasons, made as a step towards addressing cl.300.216, not as a conclusion on the issue which it had to address. In its words in brackets, the Tribunal indicated that it drew from its finding that the past relationship of marriage in Vietnam and subsequently, as claimed by the couple, was not in fact a genuine spousal relationship. It reasoned from its rejection of that claim, a finding that “*therefore there was no genuine intention to live together as spouses*” in Australia. In its terms this addressed the correct issue, and in my opinion, the reasoning given by the Tribunal, read fairly, shows that it correctly identified and addressed the criterion in cl.300.216.
34. The Tribunal’s final statement of its conclusion in [48] is impeccable in this respect, and, in my opinion, confirms that the Tribunal had a correct appreciation of the issue upon which it decided the matter.
35. It has not been contended by Mr Pham that it was not open to the Tribunal to have reasoned about the couple’s intention to cohabit in Australia as spouses at the time of visa application, from an assessment of their claim to have already commenced a spousal relationship before

that time and subsequently. Nor that it was not open on all the material for the Tribunal to have rejected that claim, and not to have been persuaded that they had a genuine intention to live together in Australia as spouses when they applied for the visa. I note that a ground of review which challenged the merits of the Tribunal's reasoning as irrational and unreasonable was withdrawn.

36. Turning to Ground 3, my above discussion also indicates why I am not persuaded by this ground. The submission made by Mr Pham's counsel was that:

The primary reason why the Tribunal was diverted into an inappropriate assessment of the factors in reg 1.15A(3) was that it failed to appreciate the relevance of the claim that the applicant and Ms Do were in an arranged relationship. As observed, there was a great deal of evidence before the Tribunal that the relationship had primarily been arranged by the applicant's sister, with the encouragement of his mother, to ensure that he would have somebody to replace his mother as a primary carer.

37. As presented in argument, the jurisdictional error which was claimed to have been made was a failure by the Tribunal to perform its jurisdictional task of addressing the factual claims made by an applicant to satisfy a visa criterion. Or put another way, the Tribunal misconceived or misunderstood the claim as made, which was that the marriage had been arranged by Mr Pham and Ms Do's family and that this accounted for some of the aspects which concerned the Tribunal. Counsel cited the jurisdictional error which was discussed in *Htun v Minister for Immigration & Multicultural Affairs* (2001) 194 ALR 244 and *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* (2004) 144 FCR 1.

38. However, counsel for Mr Pham was unable to identify evidence which persuades me that there was any overlooking of the relevant evidence or claims about the marriage being 'arranged'. The Tribunal recited evidence concerning Mr Pham and Ms Do being introduced to each other by Mr Pham's sister and mother, and that there were arrangements between the two families before he met her in Vietnam. The Tribunal expressly referred to a piece of evidence on the transcript to which I was taken, in which Mr Pham's mother told the Tribunal that when she had travelled to Vietnam she had already selected Ms Do as a

person who would be able to care for her son. I am not at all persuaded that the Tribunal overlooked or was not aware of the evidence put forward to show that this was an ‘arranged marriage’ entered into in Vietnam in February 2007.

39. The difficulty for the Tribunal was that it needed to decide, particularly in the light of Mr Pham’s past history of contrived marriages, whether the present ‘arranged marriage’ was one which carried with it a genuine intention to live together in Australia as spouses. It was that issue which, in my opinion, the Tribunal properly identified and addressed. As I have indicated, it addressed it by considering the claim which was made by Mr Pham and Ms Do that they had in fact commenced a genuine spousal relationship, albeit not legally married, from February 2007, as well as by reference to other considerations. In my opinion, the Tribunal’s examination of the issue before it squarely addressed ‘the case’ put before the delegate and the Tribunal by Mr Pham and Ms Do, and did not fail to appreciate nor misunderstand any of their factual claims.
40. Under cl.300.216, the Tribunal had the difficult task of assessing the material before it to decide what might be ‘indicators’ of the claimed intention or of its absence (compare *Minister for Immigration & Citizenship v Yucesan* (supra) at [28]). The Tribunal identified and addressed the considerations which it thought were the most relevant indicators of this. In my opinion it was entitled to take this approach, and it decided the matter in a manner which accorded to law.
41. I am therefore not persuaded by any of the arguments made on behalf of Mr Pham, and am not satisfied that the Tribunal’s decision was affected by any jurisdictional error.
42. I note that the Tribunal’s decision contains a suggestion that the Minister might wish to consider his discretionary powers to grant a visa to Ms Do and her son, particularly in the light of the birth of the latter. It was well within the province of the Tribunal to make this suggestion. However, my task is more narrow, and I would make no suggestions to the Minister. Nothing in my judgment should be read as carrying any observations bearing upon the exercise of the Minister’s discretions.
43. It is agreed that costs should follow the event in an agreed figure.

I certify that the preceding forty-two (42) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 20 April 2009